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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 500

W. N. MOREHOUSE, EMERY TRANSPORTATION COMPANY, LITTLE AUDREY'S TRANSPORTATION COMPANY, INC., LEVER BROTHERS COMPANY, AND KRAFT FOODS,
Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court
For the District of Nebraska

JURISDICTIONAL STATEMENT

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Appellants W. N. Morehouse, Emery Transportation Company, Little Audrey's Transportation Company, Inc., Lever Brothers Company, and Kraft Foods, appeal from the judgment of the United States District Court for the District of Nebraska, entered on June 1, 1961, dismissing complaints filed by appellants seeking to set aside an order of the Interstate Commerce Commission, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the United States District Court for the District of Nebraska is attached as Appendix A. It is reported at 194 F. Supp. 940 and constitutes the Court's findings of fact and conclusions of law as provided by Rule 52(a), Federal Rules of Civil Procedure. The decision of the Interstate Commerce Commission is reported at 81 M.C.C. 614, and is attached as Appendix B.

JURISDICTION

This action was brought under 28 U.S.C. § 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered June 1, 1961; a timely motion for rehearing, filed June 12, 1961, was denied by order of the District Court entered June 22, 1961. Appellants filed a joint notice of appeal in the District Court on August 17, 1961.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954); *Thompson* v. *United States*, 343 U.S. 549 (1952); *American Trucking Ass'ns* v. *United States*, 344 U.S. 298 (1953).

STATUTES INVOLVED

This case does not concern the validity of any statute; a determination of the questions presented is governed by the following provisions of the Motor Carrier Act (Part II of the Interstate Commerce Act), 49 U.S.C. § 301 *et seq*:

> Section 203(a)(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transporta-

tion by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I. (49 U.S.C. § 301(a)(14)).

Section 203(a)(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer. (49 U.S.C. § 303(a)(15)).

Section 209(b) also provides in pertinent part:

The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit . . . (49 U.S.C. § 309(b)).

QUESTIONS PRESENTED

The ultimate question is whether the Commission can lawfully authorize a *common* carrier to engage in the transportation of soap or any other article, according to whether or not the soap was actually produced or distributed by a meat packinghouse.

The Interstate Commerce Commission, in the proceeding under review, has construed the term "packinghouse products" in appellant Morehouse's common-carrier certificate of public convenience and necessity as authorizing the transportation of such non-meat products as soap, detergents, vegetable oil, margarine and the like, only when those products are "produced or distributed" by certain firms, and not when they are "produced or distributed" by others. Specifically, its construction permits the carriage of such non-meat products when they have been "produced or distributed" by a firm part of whose business is meat packing, but prohibits the carriage of the identical products when they have been produced and distributed by a competing firm not engaged in meat packing. The following questions, accordingly, are presented by this appeal:

1. Whether this construction amounts merely to a description of the commodities appellant Morehouse may carry, or whether it in reality constitutes a limitation on the shippers which appellant Morehouse may serve.

2. Whether such a limitation can lawfully be imposed on appellant Morehouse, in view of its statutory right and duty as a common carrier, under § 203 (a) (14) of the Interstate Commerce Act, to hold itself out to "the general public" as engaging in motor transportation.

STATEMENT OF THE CASE

On June 1, 1935, and continuously since that time, appellant W. N. Morehouse has held himself out to the general public to transport fresh meat, packinghouse products

and supplies, dairy products and feathers. During this time he has actually transported soap, soap powder, vegetable oils, oleomargarine and washing compounds; since May 6, 1938, such transportation has been pursuant to tariffs on file with the Commission. At all times, Morehouse has offered his services to anyone who would use them and has not limited his transportation to persons engaged in the business of a meat packinghouse. For example, Morehouse has transported washing compounds, washing powder, soap, Lux liquid and vegetable oil for appellant Lever Brothers Company, although Lever Brothers does not operate a meat packinghouse.

In 1938, upon application seasonably filed under the so-called "grandfather" clause of the Motor Carrier Act, the Commission authorized issuance to Morehouse of a certificate authorizing him to engage in transportation as a *common* carrier over irregular routes transporting "*fresh meats, packing-house products and supplies, dairy products and feathers,*" to and from certain cities specified in the order.

On April 30, 1958, the Commission undertook an investigation into the practices of Morehouse on the ground "that there is reason to believe that . . . W. N. Morehouse is transporting commodities not authorized in said certificate." A hearing was held.

Kraft Foods intervened in the proceeding before the Commission, representing to the Commission that it does not operate a meat packinghouse, but it does engage in the sale and shipment of various articles such as are sold by meat packinghouses. Kraft further showed to the Commission that it uses in its business the services of several common carriers who are certified to transport packing-

house products; that it has built up a large part of its business around the use of such carriers; and that it would be subjected to serious inconvenience and loss in competition with operators of meat packinghouses if the scope of such operating rights is narrowed by interpretation or if the services of such carriers are denied to plaintiff while remaining available to operators of meat packinghouses.

After a proposed report of the hearing examiner, to which exceptions and replies were filed, Division 1 of the Commission issued its decision; Morehouse's subsequent petition for reconsideration was denied by the entire Commission.

The Commission's decision was that Morehouses's certificate "does not authorize the transportation of washing compounds, washing powder, liquid soap, soap powder, Lux liquid and vegetable oil when such commodities were not produced or distributed by a meat packinghouse." It ordered Morehouse to cease all such transportation thereby found not to be within its certificate.

Morehouse thereafter filed his complaint in the Court below seeking an order setting aside the order of the Commission. Emery, Little Audrey's, Kraft and Lever filed intervening complaints. Lever's intervention was based on allegations similar to those Kraft had made before the Commission; Emery and Little Audrey's, on a carrier status similar to Morehouse; and Kraft's, on its intervention before the Commission. In part over appellees' objections, the District Court permitted all the appellants to intervene. The District Court received briefs and held oral argument, upon which it dismissed the complaints. The several plaintiffs thereupon jointly filed a single notice of appeal to this Court.

THE QUESTIONS ARE SUBSTANTIAL

1. This case presents a question of first impression. It presents the question whether the Interstate Commerce Commission may allow a *common* carrier by motor vehicle to carry products such as soap, detergents and cheese when those products have been produced or distributed by certain firms, while forbidding that common carrier from carrying them when they have been produced by other competing firms—where the commodities in question—the soap, detergents, and cheese—are otherwise identical in every essential respect.

This is the first case for judicial review of a common carrier certificate in which the Commission has described the commodities to be transported otherwise than by name or generic description. In an earlier case, this Court has set forth standards for determining the named commodities to be granted a "grandfather" common carrier.[1] The Court has approved[2] a *contract* carrier permit containing a "commodity description by reference to intended use"; and it has sanctioned the imposition on a *contract* carrier of a "*Keystone*" restriction—a restriction specifying the type or class of shippers to be served.[3] There is now presented for the first time the further important question whether the Commission can lawfully specify in a *common* carrier certificate that the carrier is authorized to transport soap, detergents, or cheese (or in fact any other article) that is produced by a company which also operates a meat packinghouse, while at the same time denying authority to transport soap, detergents or cheese (or any other article) that is not so produced.

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[1] *United States* v. *Carolina Freight Carriers, Inc.*, 315 U.S. 475 (1942).

[2] *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554 (1958).

[3] *Noble* v. *United States*, 319 U.S. 88 (1943).

In the early days of motor carrier regulation, numerous licenses embracing "packinghouse products" authorities were issued by the Commission, both to common carriers and to contact carriers.[4] In 1948, in the *Modifications* case, the Commission held that "packinghouse products" included soap, detergents, cheese, peanut butter and a long list of other articles that packinghouses happen to produce or distribute.[5] In 1955, in the *Chrispens* case, the Commission held that a *contract* carrier permit for "packinghouse products" covered transportation of the articles named only when they were "produced or distributed by a meat packinghouse."[6] In the case at bar, the same holding is for the first time applied to a *common* carrier.

Plaintiffs urge that such an interpretation cannot lawfully apply to a *common* carrier, who is by definition obligated to serve all comers who tender for transportation the class of property which he holds himself out to carry. In contrast, the *contract* carrier can pick and choose his patrons, and pursuant to explicit authority of Section 209(b), the Commission can, as was held in *Noble* v. *United States,* 319 U.S. 88 (1943), define the *contract* carrier's business "in terms of the type or class of shippers served."

Both the Commission and the Court below concede that as a common carrier appellant Morehouse "is not limited as to the shippers he may serve." However, they hold that "packinghouse products" is a commodity description which includes soap, detergents, cheese and other articles if produced or distributed by a meat packinghouse,

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[4] Appendix A: 81 M.C.C., at 617.

[5] *Modification of Permits—Packing House Products,* 48 M.C.C. 628 (1948).

[6] *Chrispens Truck Lines, Inc.—Investigation of Operations,* 63 M.C.C. 625 (1955).

but not otherwise. In this, they conclude that this so-called "commodity description" may be applied indiscriminately both to *contract* carriers and to *common* carriers. Finally, citing *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554 (1958), they suggest that if appellant Morehouse believes his certificate is too restrictive he should seek reopening of his "grandfather" application,[7] rather than contest the cease-and-desist order proceedings at bar.

Both the Court below and the Commission begged the first question, by simply characterizing the term "packinghouse products" as a "commodity description." On the face of it, rather, a specification, for example, of "cheese which is produced or distributed by a packinghouse," actually classifies producers and distributors, not commodities.

It does not limit or classify a particular cheese because it includes any cheese that is distributed by a packinghouse even though it was not produced by one. Manifestly such a description is all-inclusive as to cheese because even Kraft Cheese is susceptible of distribution by a packinghouse. Moreover, it cannot be, and has not been, contended that the soaps, detergents and cheese produced by companies which do not happen to have meat packing facilities—and which appellant Morehouse thus may not carry under the ruling at bar—are different in any respect from the soaps, detergents and cheese produced by companies which happen to own meat packing facilities, which Morehouse may carry. There is implicit in the Commission's ruling no limitation that the soap, detergents and cheese which Morehouse may carry have anything to do physically with the packing of meat, or are by-products of a meat packing operation, or are even physically pro-

[7] Appendix A: 81 M.C.C., at 617-8; Appendix B: 194 F. Supp., 947.

duced on the same premises as are used for meat packing. The sole criterion is the nature of the firm that is producer or distributor.

The Commission's ruling clearly then amounts to an unlawful restriction on shippers. This fact is confirmed by the kind of finding on which the Commission based its order: "The shippers are not meat packinghouses," and by the position of the Commission's Bureau "that the respondent may transport the involved commodities only for shippers which are meat packinghouses."[8]

The very purpose of the "produced or distributed" test is to limit the class of patrons the carrier may serve. The Commission relied upon *Chrispens* and quoted from it: "If respondent's interpretation were correct it might transport the vast output of soap factories and chemical factories which have no connection with packinghouses."[9] The Court quoted from the *Modifications* case to the same effect that respondent's interpretation would "permit it to serve the needs of many other industries."[10]

And obviously, the net effect of the Commission's ruling is that appellant Morehouse, although classified as a common carrier under the statute, may haul, within the geographical limits of its permit, soap and detergents for appellant Lever Brothers' competitors (if they happen also to operate meat packinghouses, as many do) but not for Lever; and may haul cheese for appellant Kraft's competitors (again, if they also happen to operate meat packinghouses, as many do) but not for Kraft. We respectfully submit that this amounts to an unlawful restriction on appellant Morehouse's right and duty to serve

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[8] Appendix A: 81 M.C.C., at 615-6.
[9] Appendix A: 81 M.C.C., at 617.
[10] Appendix B: 194 F. Supp., 945.

the public as a common carrier, and on appellants Lever's and Kraft's rights to avail themselves of the services of common carriers.

For some years the Commission has indulged in an analogous expedient, the so-called description of commodities by their "intended use," for example, "drugstore stock in trade" or "contractor's equipment."[11] While characterizing such intended use descriptions as "generally undesirable," the Commission has in certain cases gone so far as to use them in common carrier certificates.[12] Such descriptions have received judicial approval only as applied to *contract* carrier permits, see *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554 (1958)—a context where the Commission is permitted by statute to impose explicit limitations defining the business the carrier may transact, in terms of shippers, if the Commission sees fit. See *Noble* v. *United States*, 319 U.S. 88 (1943). The Commission has, in applying this "intended use" restriction to *common* carrier certificates, used rationalizations similar to those employed here in arguing that the description did not constitute a restriction on the shippers to be served.[13] But no matter what the Commission says about

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[11] *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 559 (1958); *Dart Transit Co.*, 49 M.C.C. 607, 612, 632 (1949); 54 M.C.C. 429 (1952). In fact, appellant Morehouse's certificate includes such a description, since it contains a description in terms of "packinghouse supplies."

[12] *Point Pleasant Transportation Co.*, 61 M.C.C. 666 (1953). However, when confronted with the natural practical difficulties of ascertaining "intended use," the Commission has reverted to "predominant use" as a practical test. *Pierce Auto Freight Lines, Inc.* v. *Converse*, 54 M.C.C. 447 (1953). It has done this even where the commodity was not in fact used according to the specified purpose. *Contractors Transit, Inc.*, 78 M.C.C. 349 (1958).

[13] *Andrew G. Nelson, Inc., Investigation of Operations*, 63 M.C.C. 407, 410 (1955) (contract carriers); *C. & H. Transportation Co.*, 62 M.C.C. 586, 588 (1954) (common carriers).

it, the practical, and we submit the intended, effect of either the "intended use" restriction or the restriction implicit in the ruling at bar, is to limit the patrons to be served by a common carrier, in violation of the clear statutory command.[14]

2. No court (except the court below) has evaluated or passed upon the validity under the statute of either the "intended use" or of the "produced or distributed" test embodied in the uneven-handed interpretation of "packinghouse products" applied in the ruling at bar. Since the ruling turns on a basic error of law, the courts have plenary power to review and reverse it. In principle, the decision of this Court in *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942), demonstrates this. In passing upon the view of the Commission that general commodity authority in a wide territory should not be lightly issued because it might create highway congestion and affect adversely the regular route carriers, the Court said: "Insofar as that view establishes a different test for commodities which may be carried by irregular route operators than for commodities which may be carried by regular route operators it is erroneous as a matter of law." 315 U.S.. at 485-486. To the same effect, see *United States* v. *Contract Steel Carriers, Inc.*, 350 U.S. 409 (1956) reversing the Commission for its misconception of the statutory definition of contract carriage.

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[14] The "intended use" test is analogous to the "produced or distributed" test inherent in the definition of "packinghouse products" applied below, and has for some time been used by the Commission in common carrier certificates. See the cases cited in the preceding footnote. However as applied to common carriage it has not had Congressional approval or definitive judicial approval, and it cannot, merely as a long-standing administrative rule, become valid in flat derogation of a statutory definition. *Skidmore* v. *Swift*, 323 U.S. 134, 140 (1944); Davis, *Administrative Law* (1949), pp. 205-206.

Similarly, the view that common carriers of soap or cheese should be limited to serving packinghouses to prevent their serving the vast output of soap factories is erroneous as a matter of statutory definition: a *common* carrier of cheese is, as a matter of law, different from a *contract* carrier of cheese on the precise point involved, namely, that the *common* carrier transports, and must transport, cheese for all comers.

With the exception of the ruling in the case at bar, and the uneasy line of rulings dealing with "intended use" descriptions, the long-standing practice of the Commission underscores the basic command of the statute that common carriers are to serve "the general public" without distinction as to shipper.[15] For example, *contract* carriers may be and frequently are subjected to "Keystone" restrictions, which limit the shippers they may serve. See *Noble* v. *United States, supra.* But decisions of the Commission consistently and repeatedly disclaim any authority to impose a "Keystone" restriction on the patrons to

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[15] However, the day before the case under review here was decided by Division 1, the entire Commission made a ruling of broad application which poses similar problems to the problems posed in the case at bar. The Commission held, in *T. T. Brooks Trucking Co.*, 81 M.C.C. 561 (1959), that it had authority to impose on a common carrier converted from contract carrier status pursuant to Public Law 85-163, a restriction to accord with the carrier's former contract-carrier "Keystone" restriction. Such a restriction is effected by restricting carriage to commodities "when moving to, from or between the warehouses or retail outlets of retail chain 5 & 10 cent stores." This evidently will be the Commission's practice in respect of conversions of contract carriers whose permits contain "Keystone" restrictions, and it may be anticipated that this practice will soon be the subject of a review proceeding in court. Unless it can be justified by reason of the conversion statute cf. Note, 107 U. Pa. L. Rev. 1150, 1173 (1959), it would appear to present many of the same problems as the order under review. (Of course, Morehouse is not a converted contract carrier, but an original common carrier.)

be served by a common carrier.[16] Typically, in the recent *Exhibitors* case[17] the Commission refused to impose such a restriction even though it was proposed by agreement of the parties, saying:

> "We are unable to approve the proposed restrictions even though they are acceptable to all parties. The restriction of service to 'wholesale and retail news dealers and agents' would not be consistent with the statutory obligations of a common carrier or with our decisions in respect thereof, or otherwise practical. Generally we have refrained from authorizing common carrier transportation only for a particular class of shippers on the ground that a common carrier must serve all shippers indiscriminately . . . We find that this restriction would be inconsistent with the duties and obligations of applicants as common carriers."

In view of the clear command of the statute, and the Commission's consistent disclaimer, dictated by the statute, of any authority to impose a "Keystone" restriction on a *common* carrier,[18] we submit that there is no basis

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[16] *Howitt Common Carrier Application*, 23 M.C.C. 271 (1940); *Barnett Trucking Co., Common Carrier Application*, 41 M.C.C. 303, 306 (1942); *Globe Cartage Co., Inc., Common Carrier Application*, 41 M.C.C. 313, 322 (1942); *Kickert Common Carrier Application*, 51 M.C.C. 1, 3 (1949); *Fishback Trucking Co.*, 61 M.C.C. 539 (1953); *Exhibitors Film Delivery Service Co.*, 67 M.C.C. 713, 715 (1956).

[17] *Exhibitors Film Delivery Service Co.*, 67 M.C.C. 713, 715 (1956).

[18] In another line of cases, the Commission long refused to use the so-called "plant site" description—that is, a description authorizing service to or from a named plant site—in *common* carrier certificates. The Commission first held such a description to be contrary to the common carrier's duty to serve all shippers indiscriminately. *Canny Trucking Co.*, 17 M.C.C. 559 (1939). More recently the Commission has been persuaded to use the device cautiously as a geographical description. *J. Frank Dowd*, 47 M.C.C. 69 (1947); *Western Auto Transports, Inc.*, 53 M.C.C. 780, 782 (1952). There

in law for permitting a *common* carrier to carry soa distributed by a meat packer like Armour and Compar while restraining it from carrying soap produced and di tributed by Armour's competitor Lever Brothers, esp cially when in all essential commercial respects the pro ucts are the same. But this is precisely what the Cor mission's order at bar does.

3. Finally, in contesting the order in this case, appe lant Morehouse is not making a collateral attack on i original certificate, and the rule of the *Nelson* case th such an attack may not be made is clearly not applicabl In *Nelson,* the carrier attempted, in an enforcement pr ceeding, to show that its permit, as interpreted by t Commission, misdescribed its operation during the "gran father" period, and that consequently, its operation duri the "grandfather" period should be taken as a guide the construction of the permit. 358 U.S., at 561. T Court's holding was that evidence of this nature could n be received in an enforcement proceeding, but only in proceeding to reopen the "grandfather" proceeding which the carrier had received its permit. *Id.*, at 562.

(footnote 18 continued)

has been no judicial review of such a common carrier certificate.

In another line of cases, the Commission has described the co modities to be carried by specifying commodities "such as" are de in by drugstores or "such as" are used in construction, and the li In these cases, the invariable holding is that the carrier, wheth common or contract, can transport for all comers without regard intended or actual use. *Vidas Contract Carrier Application,* M.C.C. 106 (1953); *Sanders Extension of Operations,* 47 M.C. 210, 214 (1947). The only question is whether a particular co modity is in fact a commodity "such as" is dealt in by the establis ments in question; for example, whether tobacco is such an item is dealt in by 5 & 10 cent stores or drums of gasoline such as dealt in by hardware stores. *Archie's Motor Freight, Inc.,* 73 M.C. 138, 139 (1957), *Houff Transfer, Inc.,* 69 M.C.C. 574, 575 (195

Here appellant Morehouse does not seek to bring forward evidence of an operation in the "grandfather" proceeding to impeach the words of his certificate. His contention is simply that, as a matter of law, the Commission may not interpret the words "packinghouse products" standing in a *common* carrier certificate to authorize carriage of soap, detergents and cheese when produced and distributed by certain firms and not when produced or distributed by others. This is a question of law inherent in the cease-and-desist order under review—an order which interprets appellant Morehouse's certificate as compelling this discrimination, and affirmatively orders him to carry it out. This question of law is directly reviewable in this proceeding, and appellants' question presented here does not involve such a reopening and reexamination of the "grandfather" experience in an enforcement proceeding as was ruled to be out of order in the *Nelson* case.

This case differs from *Nelson* in that no question arises here as to whether "packinghouse products" are words of art. The words "common carrier" are words of art by statutory definition which expressly requires service "for the general public" and thus nullifies any contrary interpretation of "packinghouse products." In other words, "common carrier of packinghouse products" inherently means one who engages in transportation for the general public of such articles as are produced or distributed by packinghouses. Any interpretation to the contrary is flatly opposed to the statute.

CONCLUSION

The question presented is substantial and of importance in the administration of the regulatory scheme for common carriers under the Motor Carrier Act. Probable jurisdiction should be noted.

October, 1961.

Respectfully submitted,

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MOREHOUSE v. UNITED STATES (cite as 194 F. Supp. 940 (1961)
IN THE U. S. DISTRICT COURT FOR THE DISTRICT OF NEBRASKA
Civil 01145 — MEMORANDUM OPINION
W. N. MOREHOUSE, Plaintiff
vs.
UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, Defendants

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Before JOHNSEN, *Circuit Judge* and ROBINSON and STEPHENSON, *District Judges*.
ROBINSON, *District Judge*.

This action was instituted by W. N. Morehouse (Plaintiff) against the United States of America and the Interstate Commerce Commission (Commission) pursuant to the provisions of 28 U.S.C. sections 1336, 1398, 2284, 2321 through 2325, and section 10 of the Administrative Procedure Act, 5 U.S.C. section 1009, to enjoin, annul and set aside the report and orders of the Commission, entered September 24, 1959, and January 25, 1960, Docket No. Mc-C-2244. *W. N. Morehouse—Investigation of Operations*, wherein the Commission held that plaintiff was engaged in the transportation of soap and related commodities which were not produced or distributed by a meat packinghouse; in violation of the Interstate Commerce Act, 49 U.S.C. § 306(a)(1); and requiring plaintiff to cease and desist from conducting such transportation.

The complete record made before the Commission, including all reports and orders is before the Court. The Court has jurisdiction over this case.

Applications for leave to intervene as plaintiffs were filed by Kraft Foods, a division of National Dairy Products Corporation, The Emery Transportation Company, Little Audrey's Transportation Company, Inc. and Lever Brothers Company. Leave was granted by the Court to the intervenors to file their complaints and their briefs on the issues raised in this proceeding.

Pursuant to statute, the matter came on for final hearing before a duly designated three-judge District Court on the 6th day of May, 1961. Written briefs were filed, the case was orally argued by respective counsel, and the case was submitted.

The evidentiary facts, as here pertinent, are not in dispute.

Plaintiff is an individual engaged in the business of a common carrier by motor vehicle pursuant to certificate of public convenience and necessity issued by the Commission, February 26, 1942, pursuant to section 206(a) of the Interstate Commerce Act, 40 U.S.C. § 306(a).

Plaintiff's certificate, issued under the "grandfather" clause of section 206(a) of the Act, authorized, so far as pertinent, the transportation of "packinghouse products and supplies", from Omaha, Nebraska, to Chicago, Illinois, Sioux City, Iowa, and Denver, Colorado, over irregular routes. Since receiving his "grandfather" certificate, plaintiff, has, from time to time, transported soap and soap products for Lever Brothers Company and Climalene Company, westbound from Chicago. Specifically, during a 2 month period in 1958, he transported 12 separate shipments for Lever Brothers Company of vegetable oil, washing compound, washing compound liquid, soap, soap powder, and lux liquid, from Chicago and Hammond, Indiana, to various chain grocery stores, wholesale storage companies, and a public warehouse at Omaha, Nebraska, and Sioux City, Iowa, and 2 shipments for Climalene Company of washing powder and washing compound from Chicago to an Omaha public warehouse and a Sioux City wholesale grocery company. The shippers in question were not meat packinghouses but were manufacturers and distributors of soap, soap products, cleaning compounds, detergents, vegetable oils and oleo margarine. The consignees also were not meat packinghouses, meatpackers, or slaughterers. When advised by the Commission's field representative that such operations were unauthorized, plaintiff discontinued transporting the items in question.

The proceeding before the Commission was instituted by Division 1 of the Commission on its own motion to determine whether plaintiff was engaged in the transportation of certain commodities not authorized by his certificate. By the terms of the order instituting the investigation, Morehouse was named as respondent.

A hearing was had before a hearing examiner at Omaha, Nebraska, on September 25, 1958. The parties appeared and presented evidence. The hearing examiner filed his report and recommended order on February 3, 1959, finding that the commodity description "packinghouse products" in plaintiff's certificate did not authorize the transportation of washing compound, washing powder, washing compound liquid, soap, soap powder, lux liquid, and vegetable oil or any other commodity which had not in fact been produced or distributed by a meat packinghouse. He further found that plaintiff had been engaged in transporting such commodities without proper authority and recommended that a cease and desist order be entered.

Exceptions to the report and recommended order of the examiner were filed separately by plaintiff and by Kraft Foods. On September 24, 1959, Division 1 of the Commission issued a report and order affirming the hearing examiner's findings and directing plaintiff to cease and desist from performing the above-described transportation. Petitions for reconsideration of the report and order were filed by plaintiff and Kraft Foods. These petitions were denied on January 25, 1960. Plaintiff and the intervening plaintiffs then filed the instant action attacking the validity of the Commission's orders.

Plaintiff in his complaint here claims that the order of the Commission is erroneous, arbitrary, capricious, and an abuse of discretion, in substance as follows:

1. The Commission incorrectly found that certain specified commodities may not be transported by plaintiff when they have not been produced by or distributed by a meat packinghouse.

2. That the generic description "packinghouse products and supplies", as used in Morehouse's certificate, is for the sole purpose of identifying the particular articles that may be transported by him for the general public and contains no restriction with respect to the character of the consignor or consignee for which the transportation of such commodities may be performed.

3. That the certificate issued to plaintiff does not restrict the transportation by him to any commodity which has in fact been produced by, or is being distributed by a meat packinghouse.

4. That the decision of the Commission is a partial revocation of plaintiff's certificate of public convenience and necessity in violation of the Interstate Commerce Act, and

5. That the orders of the Commission are not based upon adequate findings because of the failure and refusal of the Commission and it's hearing examiner to consider evidence of the transportation actually performed by plaintiff at the time of and prior to the investigation, and particularly evidence of the commodities actually transported, and the business of the shippers for whom such commodities were transported before and after June 1, 1935.

In considering the scope of judicial review of orders of the Interstate Commerce Commission, several well-known principles must be kept in mind. First, the action of the Commission is presumed valid. The Commission alone is authorized to decide upon the weight of the evidence and the significance of the facts. *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349, 359. The Court must sustain the Commission if its findings are supported by substantial evidence. *Universal Camera Corporation* v. *N. L. R. B.*, 340 U.S. 474, 491 Cf. *Watson Bros. Transportation Co.* v. *United States*, D.C. Nebr., 59 F. Supp. 762, 768;

Shaffer v. *United States*, D.C. S. Dak., 139 F. Supp. 444, 448.

The issues raised and the questions presented in this proceeding are (1) whether the Commission erroneously, arbitrarily or capriciously construed the certificate of plaintiff, insofar as it authorizes the transportation of "packinghouse products", as not authorizing the transportation of soap and related commodities not products or distributed by a meat packinghouse and (2), whether the Commission properly denied the admission of evidence of plaintiff's "grandfather" operations in construing his certificate, insofar as it authorized the transportation of "packinghouse products".

The Commission is authorized to classify motor carriers by the service they render, under section 204(b) of the Interstate Commerce Act, 49 U.S.C. § 304 (b), which provides:

> "The Commission may from time to time establish such just and reasonable classifications of brokers or of groups of carriers included in the term 'common carrier by motor vehicle', or 'contract carrier by motor vehicle', as the special nature of the services performed by such carriers or brokers shall require * * *."

It may attach to certificates issued to common carriers by motor vehicle terms and conditions respecting the services they may render, under section 208(a) of the Act, 49 U.S.C. § 308(a):

> " * * * there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, * * * ".

The rendition of services by a motor common carrier not authorized by its certificate is prohibited by section 206(a)(1) of the Act, 45 U.S.C. § 306(a)(1):

> " * * * no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation upon any public highway * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations * * *."

Plaintiff contends that the Commission erroneously construed the words "packinghouse products" too narrowly and that carriers with authority to transport "packinghouse products" are authorized to serve not only meat packers, but nonpackers producing the same or similar commodities.

While plaintiff argues that the Commission's decision herein is not consistent with any recognized principle involved in the interpretaton of commodity descriptions, the Commission, in *Dart Transit Co.—Investigation of Operations*, 54 M.C.C. 429, 438, sustained, *Dart Transit Co.* v. *Interstate Commerce Commission*, 110 F. Supp. 876, found that a cleanser transported by the respondent was not within the commodity description "packinghouse products" as the commodity had not been produced or distributed by a meat-packinghouse even though the cleanser was similar to the cleansers distributed by meat packinghouses.

In *Safeway Truck Lines, Inc.—Investigation of Certificate*, 74 M.C.C. 679, the respondent, a certified common carrier, contended it could transport flour-bleaching compounds under its "packinghouse products" authority. The Commission rejected this contention, and held that while " * * * chemicals and chemical compounds are listed in the appendixes in the *Descriptions* (61 M.C.C. 209) and *Modifications* (46 M.C.C. 23) cases as commodities which authorized carriers or packinghouse products may transport, the lists established in those cases are prefaced by the heading "Articles Distributed by Meat-Packinghouses", thereby allocating to that category only those articles distributed by meat packinghouses.

Here the flour-bleaching compounds are distributed by a producer of drugs and chemicals, thus neither of the cited cases support respondent's contention and we conclude that its authority to transport packinghouse products does not permit the transportation of flour-bleaching compounds".

In *Chrispens Truck Lines, Inc.—Investigation of Operations*, 63 M.C.C. 625, the respondent transported soap, soap products and washing compounds for B. T. Babbitt, Inc. and Lever Brothers. It was argued that these commodities were included in the "packinghouse products" lists and therefore were included under its authority to transport "packinghouse products" regardless of whether they were products of or distributed by meat packinghouses. The Commission, in rejecting this argument, held:

> "The purpose of the proceeding in the *Modification* case was to determine the meaning of the term "packinghouse products" and related terms in order to permit carriers having such authority to give a full and complete transportation service for meat packinghouses. The intention was to identify the various commodities produced or distributed by meat packinghouses which were comprehended by the term "packinghouse products". The commodity lists set forth did not purport to identify commodities which could be transported without regard to who produced them or by whom they were distributed. Respondent in transporting the described commodities is serving two companies unrelated to meat packinghouses. It justifies its operations on the grounds that it finds the names or the classes of the commodities shipped by these nonpackers in the list appended to the Modification report. We cannot agree with respondent's position. If construed as respondent would have us construe its authority, the interpretation would extend the carrier's rights far beyond that intended or even proposed when the authority was sought and permit it to serve the needs of many other industries in the transportation of commodities not in fact produced or distributed by meat packinghouses. * * * ."

In two recent decisions, *Argo-Collier Trucklines Corp. Ext.—Cleaning Compounds*, 83 M.C.C. 433, 435, and *Haugarth—Investigation and Revocation of Certificate*, 83 M.C.C. 395, 398, the Commission has affirmed its view that common-carrier transportation of soap and soap products involved under existing authority to transport "packinghouse products" was beyond the scope of such authority because the commodities in question were neither produced nor distributed by a meat packinghouse.

Plaintiff here seeks to distinguish his situation from that before the Commission in the *Chrispens* case, contending that, unlike the respondent in the *Chrispens* case, he is a common carrier upon whom no "keystone" restriction, or limitation as to shippers or classes of shippers that he can serve, may be imposed. The Commission held, however, that while the *Chrispens* case involved the permit of a contract carrier, the reasoning from a commodity standpoint was applicable to plaintiff here. That plaintiff's certificate was not unrestricted, because by its very terms the transportation authorized therein was limited to certain classes of commodities, namely, "packinghouse products". Plaintiff is not limited as to the shippers he may serve, however, this does not mean that the limitations inherent in his commodity authorization can be ignored or that the commodity description "packinghouse products" in his certificate authorizes any different transportation, commodity-wise, than the same authority in a permit. The fact that plaintiff is unrestricted as to the shippers he may serve affords no basis whatever for the expansion of the scope of the commodity description in any permit issued by the Commission.

In construing analogous commodity descriptions the Commission has consistently held them not to be restrictive of the shippers or class of shippers that the carrier can serve. See and compare *Andrew G. Nelson, Inc.—Investigations of Operations*, 63 M.C.C. 407, 410, sustained *Andrew G. Nelson, Inc. v. United States*, 150 F. Supp. 181, affirmed, 355 U.S. 554, where the Commission held that the commodity limitation in its permit does not limit the class or type of persons with whom it may contract as would a "keystone" restriction; and *Sanders Extension of Operations—Washington D.C.*, 74 M.C.C. 210, 213, 214 where the Commission held that as long as the commodities transported are such as are dealt in by wholesale and retail grocery stores, respondent was free to transport them for any shipper or consignee regardless of the business in which he or it is engaged.

The Statutory court in *Ace Lines, Inc. v. United States*, 14 Fed. Car. cases, paragraph 18 (S.D. Ia. 1960), recently declared that the primary responsibility for interpreting certificates and determining what items fall within a commodity description contained in a certificate rests in the Interstate Commerce Commission. It is for the Commission rather than the courts to select and apply the tests to be used in determining what commodities fall within a commodity description. If the Commission's action in these respects is not arbitrary or capricious or the result of an abuse of discretion, or induced by an erroneous view of the law, the court will not interfere.

Plaintiff here is authorized to transport "packinghouse products" for who ever chooses to avail himself of plaintiff's services; however, this does not enlarge the description of the commodities that plaintiff may transport so as to include soap and related products not produced or distributed by a meat packinghouse.

Plaintiff contends that he has continuously since 1938 published rates and has had on file with the Commission tariffs naming rates on the commodities which he was transporting in 1938 pursuant to the descriptions "packinghouse products and supplies" for anyone who sought his services within the territorial scope of his operating authority. These tariffs list soap, powders, washing compounds, soda and alkali products among the commodities on which the rates applied. However, the Commission has consistently held that commodity classifications for rate purposes do not control interpretations of commodity descriptions in a motor carrier's operating rights. *Western Auto Transport, Inc., Ext.—Colo. and N. Mex.*, 81 M.C.C. 73, 74 and cases cited there. The fact that Plaintiff here may have published rates on soap and related commodities without indicating in its tariffs the limitations upon the movements of such commodities imposed by the commodity description in its certificate would in no way enable him to transport commodities which in fact are not "packinghouse products" not produced or distributed by a meat packinghouse.

In *Dart Transfer Co. v. Interstate Commerce Commission, supra*, at 110 F. Supp. 880, the court, speaking through Judge Sanborn stated:

> "* * * In *Nobel v. United States*, 319 U.S. 88, 93 the Supreme Court said that 'The precise delineation of an enterprise which seeks the protection of the 'grandfather' cause had been reserved for the Commission. By the same token, we think that within reasonable limits it is for the Commission to determine the scope of the delineation. The meaning of words may be a question of law or a question of fact. (citing cases) Words may have one meaning when used in industry or in the regulation of industry and another meaning when used in common speech. We are not convinced that in the interpretation

> of Dart's permit the Commission misapplied the law or exceeded its jurisdiction. * * * In the interest of uniformity in the regulation and policing of the motor carrier industry, it is of course essential that the Commission be subjected to as little judicial interference as the law will permit."

We are satisfied that the Commission's interpretation of the words "packinghouse products and supplies" is not arbitrary or capricious, and that the Commission reached a permissible conclusion in making the interpretation that it did. We are not convinced that any finding of the Commission was clearly wrong. There was factual and legal basis for the Commission's order; and, in our opinion, it was not the result of any abuse of discretion on the part of the Commission.

Finally, plaintiff contends that the Commission, in rejecting all evidence of plaintiff's operations conducted at the time his authority was issued, committed fundamental error and that he was thereby deprived of due process. It is argued that the certificate issued to plaintiff on February 26, 1942, embraced all of the operations conducted by him during the "grandfather period," including the transportation of soap for non-packers.

The report and order of the Commission here did no more than interpret the authority to transport "packinghouse products and supplies" as found in plaintiff's certificate, and such interpretation, declaratory of the operating authority possessed by plaintiff, in no way modified or revoked his rights. We are in agreement with the Commission, that plaintiff's remedy, if his certificate does not reflect completely the "grandfather" operations he performed, lies, not in attacking the Commission's construction of the term "packinghouse products", but in having the "grandfather" proceedings reopened for modification of his operating rights. *Nelson, Inc.* v. *United States*, 355 U.S. 554, 561-562.

This memorandum shall constitute the Court's findings of fact and conclusions of law, as provided by rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.

Judgment will be entered dismissing the complaint.

APPENDIX B

No. MC-C-2244

W. N. MOREHOUSE — INVESTIGATION OF OPERATIONS

Decided September 24, 1959

Respondent found to have been conducting operations not authorized by his certificate No. MC—48221 in violation of section 206(a) of the Interstate Commerce Act. Cease and desist order entered.

C. A. Ross for respondent.

Robert N. Burchmore for intervener in support of respondent.

Harry F. Horak, Don A. Boyd, and *Ellis V. Gregory* for the Bureau of Inquiry and Compliance, Interstate Commerce Commission.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GOFF, AND WEBB

BY DIVISION 1:

Exceptions to the order recommended by the examiner were filed by respondent and intervener, and the Commission's Bureau of Inquiry and Compliance, hereinafter called the Bureau, replied.

By an order dated April 30, 1958, division 1 instituted an investigation on its own motion under authority of sections 204(c) and 212(a) of the Interstate Commerce Act to determine whether W. N. Morehouse, of Omaha, Nebr., hereinafter called respondent, is and has been engaged in the transportation of commodities not authorized by the certificate of public convenience and necessity issued to him in No. MC-48221, in violation of section 206(a)(1) of the act. Kraft Foods, a division of National Dairy Products Corporation, intervened in the proceeding.

The examiner found that respondent's certificate, insofar as it authorizes the transportation of "packinghouse products," does not authorize the transportation of washing compound, washing powder, washing compound liquid, soap, soap powder, lux liquid, vegetable oil, or any other commodity which has not in fact been produced by, or is being distributed by, a meat packinghouse; that respondent has engaged in the transporta-

tion of such commodities without proper authority; and that an order should be entered requiring respondent to cease and desist therefrom. Respondent contends, on exceptions, that he may transport the above items under the packinghouse products authority in his certificate and that since this authority is unrestricted he may transport traffic thereunder for any shipper desiring his service, whether or not that shipper is a meat packinghouse. He argues that the examiner failed to realize that respondent is a common carrier obligated to serve all shippers; that the decisions of this Commission on which the examiner relies are distinguishable because they only affect or involve contract carriers; that his services should not be limited to packinghouses or slaughter houses when other concerns pack and handle the same commodities; and that the examiner should have allowed the introduction of evidence showing the kind of service respondent provided prior to the issuance of his "grandfather" authority as an aid to construing his "grandfather certificate." Intervener contends, in addition, that respondent's operating authority does not restrict him to serving only packinghouses because his certificate is not limited by a so-called Keystone restriction, nor is his packinghouse commodity description therein qualified as to an "intended use." The Bureau in reply maintains that the respondent may transport the involved commodities only for shippers which are meat packinghouses; and that any evidence concerning traffic handled by respondent prior to issuance of his "grandfather" certificate is inadmissible because (1) it constitutes a collateral attack on respondent's certificate without notice to competing carriers, and (2) there is no ambiguity in the term "packinghouse products."

The evidence, the examiner's recommendations, the exceptions, and the reply have been considered. The examiner's statement of facts is complete and accurate and is adopted as our own.

Respondent's certificate No. MC-48221, issued under the "grandfather" clause of section 206(a) of the act, authorizes, so far as pertinent, the transportation of "packinghouse products and supplies," (*a*) from Omaha, Nebr., to Chicago, Ill., Sioux City, Iowa, and Denver, Colo., (*b*) from Chicago to Omaha, Sioux City, and Denver, and (*c*) from Sioux City to Chicago, Omaha, and Denver, over irregular routes. Since he received his "grandfather" certificate, respondent has been transporting soap and soap products for Lever Brothers Company and Climalene Co., westbound from Chicago. Specifically, during a 2-month period in 1958, he transported 12 separate shipments for Lever Brothers Company of vegetable oil, washing compound, washing compound liquid, soap, soap powder,

and lux liquid, from Chicago and Hammond, Ind., to various chain grocery stores, wholesale storage companies, and a public warehouse at Omaha, Nebr., and Sioux City, Iowa, and 2 shipments for Climalene Co. of washing powder and washing compound from Chicago to an Omaha public warehouse and a Sioux City wholesale grocery company. The shippers are not meat packinghouses but are manufacturers and distributors of soap, soap products, cleaning compounds, detergents, vegetable oils, and oleomargarine. The consignees also were not meat packinghouses, meatpackers, or slaughterers. When advised by our field representative that such operations were unauthorized, respondent discontinued transporting the items in question.

At the hearing, respondent attempted to offer evidence tending to show that prior to the "grandfather" date he had transported soap and soap products not only for packinghouses, but also for other concerns, and he maintained that his "grandfather" certificate was intended to continue such operations. Upon objection by the Bureau, the examiner sustained the objection and refused to allow respondent to introduce such evidence. Where, as here, there is no ambiguity in the language of the certificate as issued, it is neither necessary nor proper to examine the record which formed the basis for its issuance in order to determine what authority was granted. *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289. The sole question presented here is whether respondent may lawfully transport the above-named commodities under his existing authority. Accordingly we affirm the examiner's ruling in this respect.

All of the authority that respondent presently holds is set forth in his certificate No. MC-48221 issued in February 1942. If respondent believes that his "grandfather" application has been decided erroneously on the evidence of record, or that he could supplement the "grandfather" record with proof of more extensive operations, such relief is available by filing an appropriate petition in the "grandfather" proceeding. See *P. Saldutti and Son, Inc., Interpretation of Permit*, 63 M.C.C. 593, and *Nelson* v. *United States*, 355 U.S. 554.

The authority under which respondent contends he may transport the above items: namely, washing compound, washing powder, washing compound liquid, soap, soap powder, lux liquid, and vegetable oil, is authority to transport "packinghouse products." His contention that he may lawfully transport such articles under that authority is based upon, or stems from the fact, that he considers them to be included within the term

"packinghouse products" irrespective of whether they have been actually produced by, or are being distributed by, a packinghouse. In the early days of regulation the commodity description "packinghouse products," such as respondent here has, was used in a number of grants made to both common and contract carriers who were serving the meatpacking industry. The actual items included by the term "packinghouse products" were later considered in *Modification of Permits—Packinghouse Products*, 48 M.C.C. 628, and again in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 and 766, and substantially the same lists were prescribed in both of these proceedings. In the compilation of these lists only those articles which were, in fact, either produced or distributed by packinghouses were included. On the other hand, the articles in question which were transported by respondent were not produced or distributed by a packinghouse, but rather were manufactured by firms engaged in a different line of business. There is no question but that the products of the latter concerns, such as the soap and lux liquid produced by Lever Brothers, are not, in fact, products of a packinghouse, and hence do not fall within the generic commodity description "packinghouse products." In considering a similar contention involving a contract carrier in *Chrispens Truck Lines, Inc.—Investigation of Operations*, 63 M.C.C. 625, at page 629 it was stated:

> The purpose of the proceeding in the **Modification** case was to determine the meaning of the term "packinghouse products" and related terms in order to permit carriers having such authority to give a full and complete transportation service for meat packinghouses. The intention was to identify the various commodities produced or distributed by meat packinghouses which were comprehended by the term "packinghouse products." The commodity lists set forth did not purport to identify commodities which could be transported without regard to who produced them or by whom they were distributed. * * * If respondents interpretation were correct it might transport the vast output of soap factories and chemical factories which have no connection with packinghouses and all the advertising matter put out by these and other industries. We do not doubt that certain products produced by Babbitt and Lever Brothers are similar in all essential respects to those produced by Swift & Company and other meat packinghouses. However, only those commodities which have in fact, been produced or distributed by meat packinghouses may be transported under respondent's "packinghouse products" authority.

Although the *Chrispens* case dealt with a permit held by a contract carrier, the reasoning from the commodity standpoint is equally applicable here. Thus we cannot agree with respondent's contention that his certificate is unrestricted, because by its very terms the transportation authorized therein is limited to a certain class of commodities, namely, "packinghouse products." Moreover, while we agree with respondent that as a

common carrier he is not limited as to the shippers he may serve, this does not mean either that the limitations inherent in his commodity authorization can be ignored, or that the commodity description "packinghouse products" in a certificate authorizes any different transportation, commoditywise, than the same authority in a permit. Stated somewhat differently, the fact that respondent is unrestricted as to the shippers he may serve affords no basis whatever for the expansion of the scope of the commodity description "packinghouse products" in respondent's or any other certificate over and above that which is authorized by the same commodity description in any permit issued by this Commission. In the circumstances here, we conclude that because the commodities in question were neither produced nor distributed by a meat packinghouse, such operations were beyond the scope of respondent's authority.

We find that respondent's certificate No. MC-48221, insofar as it authorizes the transportation of "packinghouse products" does not authorize the transportation of washing compound, washing powder, washing compound liquid, soap, soap powder, lux liquid, and vegetable oil when such commodities were not produced or distributed by a meat packinghouse; and that respondent has engaged in the transportation of such commodities without proper authority and in violation of section 206(a)(1) of the act.

An order will be entered requiring respondent to cease and desist, and hereafter to refrain and abstain, from all operations in interstate or foreign commerce of the character found in this report to be unlawful.

SUPREME COURT, U. S.

NOV 15 1961

JOHN F. DAVIS, CLERK

No. 500

In the Supreme Court of the United States

OCTOBER TERM, 1961

W. N. MOREHOUSE, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

MOTION TO AFFIRM

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Interstate Commerce Act (49 U.S.C. 1 *et seq.*):

Section 203(a)(15) — 7

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court, which sustained an order of the Interstate Commerce Commission directing appellant Morehouse to cease and desist from conducting unauthorized motor carrier operations. Morehouse is a

common carrier by motor vehicle authorized to transport, between specified points over irregular routes, various commodities including "packinghouse products and supplies." In a proceeding to determine the scope of Morehouse's certificate the Commission, after full administrative proceedings, held that the term "packinghouse products" does not authorize the transportation of such related commodities as soap, washing compound, and vegetable oil which are not in fact produced or distributed by meat packinghouses (J.S. App. 11).

The Commission found that Morehouse had been transporting such commodities as soap and soap products for shippers which were not meat packinghouses, but were either manufacturers of such products, or distributors of such products that had not been manufactured by packinghouses. Noting that it had frequently construed the term "packinghouse products" in grants of operating authority as including only those articles which were actually produced or distributed by packinghouses, the Commission concluded that products "such as the soap and lux liquid produced by Lever Brothers, are not, in fact, products of a packinghouse, and hence do not fall within the generic description 'packinghouse products'" (J.S. App. 10).

The Commission pointed out that in an earlier general proceeding in which it specified the particular commodities covered by the term "packinghouse products" (*Modification of Permits—Packing House Products,* 46 M.C.C. 23, 48 M.C.C. 628; *Descriptions in Motor Carrier Certificates,* 61 M.C.C. 209), no dis-

tinction was made between contract and common carriers. The Commission rejected Morehouse's contention that since he was a common carrier obligated to serve all shippers he was entitled to transport any commodity that packinghouses produce, even though the particular products were not produced or distributed by a packinghouse. The Commission stated that "while we agree with [Morehouse] that as a common carrier he is not limited as to the shippers he may serve, this does not mean either that the limitations inherent in his commodity authorization can be ignored, or that the commodity description 'packinghouse products' in a certificate authorizes any different transportation, commoditywise, than the same authority in a permit" (J.S. App. 10–11).

Petitions for reconsideration were denied by the full Commission, and the three-judge district court unanimously sustained the Commission's decision (J.S. App. 1–6).

ARGUMENT

The sole question presented by this appeal is whether the Interstate Commerce Commission properly interpreted the meaning of the phrase "packinghouse products" in one of its common carrier certificates. After full administrative proceedings, the Commission, in accordance with its settled construction of the term, held that the commodity description "packinghouse products" includes only those items which were in fact either produced or distributed by packinghouses. It is axiomatic that the interpretation of a Commission certificate is pri-

marily a question for the agency (*Service Transfer Co.* v. *Virginia*, 359 U.S. 171), and that the Commission's interpretation will be sustained "unless clearly erroneous" (*Nelson* v. *United States*, 355 U.S 554, 558). The district court held that the Commission's interpretation of Morehouse's certificate was not shown to be "clearly wrong" or lacking factual or legal support (J.S. App. 6). This decision is correct and this appeal presents no substantial question calling for plenary review by this Court.

1. The Interstate Commerce Commission "from the beginning of motor-carrier regulation has identified the commodities authorized to be transported in three principal ways: (a) by naming them specifically * * * (b) by the use of generic or class terms, and (c) by reference to the intended future use" (*C & H Transportation Co., Inc.—Interpretation of Certificate*, 62 M.C.C. 586, 587). In defining the scope of operating authority, however, the Commission has always given the same terms the same meaning for both common and contract carriers. With respect to those specialized motor carriers, including the appellants, authorized to serve the meat packing industry, the Commission has consistently defined their operating authority in terms of "packinghouse products" rather than in broader terms like "such products as are produced and distributed by packinghouses," which the Commission has sometimes used for other commodities.[1] The Commission has treated the grant of

[1] See, e.g., *Interstate Commerce Commission* v. *Ratner*, 6 Fed. Carriers Cases ¶ 80, 415 ("such merchandise as is dealt in

authority to carry "packinghouse products" as covering only "a particular class of commodities which are produced by and distributed by meat packinghouses" (*Crispens Truck Lines, Inc.—Investigation of Operations,* 63 M.C.C. 625, 630), but not the same products when manufactured by someone other than a packinghouse. *Dart Transit Co.* v. *Interstate Commerce Commission,* 110 F. Supp. 876 (D. Minn.), affirmed, 345 U.S. 980; *Safeway Truck Lines, Inc.—Investigation of Certificate,* 74 M.C.C. 679; *Haugarth—Investigation and Revocation of Certificate,* 83 M.C.C. 395.

The Commission explained the reason for this limitation in the *Chrispens* case, *supra.* In rejecting the contention that authority to haul "packinghouse products" also included products produced or distributed by non-packers, the Commission stated (p. 629):

> If construed as respondent would have us construe its authority, the interpretation would extend the carrier's rights far beyond that intended or even proposed * * * and permit it to serve the needs of many other industries in the transportation of commodities not in fact produced or distributed by meat packinghouses. For example, items classified under packinghouse products in item (c) [of the *Modification* report, 46 M.C.C. at 33] include soap,

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by wholesale food business houses"); *Anton Vidas—Contract Carrier Application,* 62 M.C.C. 106 ("such commodities as are sold by retail mail-order houses"); *National Trucking Co.—Extension, Electrical Appliances,* 51 M.C.C. 638 ("such commodities as are dealt in by wholesale and retail hardware stores").

> soap products, chemicals, chemical compounds, advertising matter not further identified, and many other specific and generic terms. If respondent's interpretation were correct it might transport the vast output of soap factories and chemical factories which have no connection with packinghouses and all the advertising matter put out by these and other industries. * * *

In *Nelson* v. *United States,* 355 U.S. 554, this Court upheld the Commission's ruling that a contract carrier permit authorizing the transportation of "stock in trade of drug stores" did not cover other "goods such as are sold in drug stores" (p. 559). The Court noted (*ibid.*) that "such a reading enlarges the ordinary meaning of the words," and it stated (p. 560, footnote omitted) that "if the Commission's purpose has been to authorize transportation of goods like those named in the permit, that purpose consistently has been revealed by use of the phrase 'such as,' or a close variation thereof." See note 1, *supra,* pp. 4–5.

Appellants, although conceding that, in the case of *contract* carriers, "packinghouse products" do not include products made or distributed by non-packers, urge that a different result should obtain when *common* carriers are involved (J.S. 16). The argument is that, since a common carrier must serve all shippers, and since it may carry "packinghouse products," it may do so for all shippers, not just for packinghouses. The short answer is that the term "packinghouse products" is a description of the kind of commodity to be carried, not of the class of shippers to be served. The appellant carriers are free to serve all shippers

(see *infra*, Point 2); in serving such shippers, however, they may carry only the commodities they are authorized to transport, namely, "packinghouse products." And, as noted, that term covers only products manufactured or distributed by packinghouses. The Commission has used the same words for both common carrier certificates and contract carrier permits. Although both the decision of this Court in the *Nelson* case, *supra*, and of the Commission in the *Chrispens* case, *supra*, involved contract carriers, their reasoning is equally applicable to common carriers.

2. As both the Commission (J.S. App. 11) and the district court (J.S. App. 4) found, a commodity description has the same meaning whether the particular authority involved is the certificate of a common carrier or the permit of a contract carrier. While appellant Morehouse, unlike a contract carrier (see § 203(a)(15) of the Act (49 U.S.C. 303(a)(15)), may not be restricted as to the shippers he may serve, the certificate in the present case is not "unrestricted, because by its very terms the transportation authorized therein is limited to a certain class of commodities, namely, 'packinghouse products'" (J.S. App. 10). As long as appellants transport the goods identified by their certificates, they are as free as common carriers to serve anyone tendering such traffic, whether producer, wholesaler, distributor, retailer, warehouseman or other. But, as the Commission concluded (J.S. App. 11), "the fact that [appellants are] unrestricted as to the shippers [they] may serve affords no basis whatever for the expansion of the

scope of the commodity description 'packinghouse products' in [appellants'] or any other certificate over and above that which is authorized by the same commodity description in any permit issued by this Commission."

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 500

W. N. MOREHOUSE, EMERY TRANSPORTATION COMPANY, LITTLE AUDREY'S TRANSPORTATION COMPANY, INC., LEVER BROTHERS COMPANY, AND KRAFT FOODS, *Appellants*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal from the United States District Court for the District of Nebraska

BRIEF FOR THE APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

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1. In an effort to foreclose plenary appellate review of the District Court's judgment in this case, the appellees offer the following "short answer" to the basic question involved in this litigation: "The short answer is that the term 'packinghouse products' is a description of the kind of commodity to be carried,

not of the class of shippers to be served. The appellant carriers are free to serve all shippers; . . . in serving such shippers, however, they may carry only the commodities they are authorized to transport, namely 'packinghouse products.' And, as noted, that term covers only products manufactured or distributed by packinghouses." (Motion to Affirm, pp. 6-7).

With all due respect, a semantic dodge will not serve to answer the basic question in this case. A somewhat longer and more complete answer is in order, and we submit that it can only come through plenary consideration by this Court.

The appellees do not deny the fundamental proposition that a common carrier, such as appellant Morehouse, may not lawfully be restricted as to the shippers it may serve. But through the guise of an interpretation of a commodity description so as to impose a built-in limitation on shippers, that is precisely what the Commission has done here and what the District Court has sanctioned.

To put a concrete illustration: Appellant Lever Brothers Company makes "Lifebuoy" soap. Armour & Company, part of whose business happens to be the slaughter of animals, makes the competing "Dial" soap. The Examiner, whose fact findings were affirmed by the Commission (81 M.C.C., at 615), found that products, such as soap, "produced and sold by Lever Brothers Company . . . are similar in all essential respects to those produced by meat packinghouses." (Ex'r's Rep., p. 4). Appellant Morehouse, under the Commission's interpretation, may carry "Dial" soap for Armour from the Chicago zone to an A&P warehouse in Omaha, but it may not carry "Lifebuoy" soap for Lever on the same journey to the same consignee.

Can the Commission's ruling as to "packinghouse products," which produces this result, rationally be said to be "a description of the kind of commodity to be carried, not of the class of shippers to be served"? Is Dial soap a different "kind of commodity" from Lifebuoy soap?

There is more. If a factory were to make the identical soap for Lever and for Armour, and sell it to them for distribution (whether under the same or varying labels), Armour could use appellant Morehouse's services in distributing the soap but appellant Lever could not. This is because the Commission says that soap becomes a "packinghouse product" when it is "*distributed*" by a meat packinghouse. Or to take a further example: if Lever made a certain soap, it could not, in distributing the soap itself, use appellant Morehouse's service; but if it sold the soap to its competitor Armour for distribution, appellant Morehouse then could carry it. These examples negate the appellees' bland assertion that all that is involved here is "a description of the kind of commodity to be carried, not of the class of shippers to be served".

2. The appellees' argument that commodity descriptions generally have the same meaning in contract carrier permits as in common carrier certificates is wide of the mark where, as here, the statute demands a contrary result. Where the Commission's interpretation of a commodity description is such as to impose a limitation on a carrier, restricting it to serving particular classes of shippers, it conflicts with the statutory standard defining *common* carriage, even though it may be permissible in respect to a *contract* carrier. See *Noble* v. *United States*, 319 U.S. 88 (1943). A common carrier must serve the public indiscriminately, while a contract carrier has no such obligation.

The appellees' Motion to Affirm makes it plain that the limitation involved here originated in the context of the regulation of *contract* carriers, (pp. 5 and 6), and is one designed to prevent the carrier from "*serving . . . other industries*" than the meat packers, even though, as the Motion to Affirm concedes, what is involved are "the same products" (p. 5). This cannot be done to a *common* carrier under the statute.

3. The appellees do not controvert the position taken in the Jurisdictional Statement (p. 7) that the question presented for judicial review in this case is one of first impression. The question whether the Commission may lawfully limit a common carrier to carrying certain products only where they have been produced or distributed by certain types of companies has never been determined by a court, prior to the District Court's ruling in this case. This question is not one of simple interpretation of a certificate, but rather of the Commission's power under the Act to impose a restriction of the sort implicit in its interpretation of "packinghouse products" here—a restriction which limits the common carrier's ability to perform its obligations under the Act and under its certificate.[1]

Clearly the question presented is substantial and apt to be recurring, as well as one of first impression. As the Motion implies (p. 4), the terminology in issue here occurs in a number of carriers' certificates. The authorities cited by the appellees in support of the cor-

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[1] One of the conditions imposed on appellant Morehouse's common carrier certificate, like all others issued by the Commission, is that the holder "shall render reasonably continuous and adequate service *to the public* . . ." (Certificate, Ex. B to Complaint, p. 2, emphasis supplied).

rectness of the District Court's ruling admittedly involve *contract* carriers rather than *common* carriers. (Motion, p. 7). The argumentative grounds of the appellees, given in support of the correctness of the District Court's ruling, are highly questionable as we have shown. In these circumstances probable jurisdiction should be noted.

CONCLUSION

The grounds stated in the Motion to Affirm for a preclusion of plenary appellate review are inadequate, as are the Motion's grounds for supporting the judgment below. For the reasons stated herein and in our Jurisdictional Statement, probable jurisdiction should be noted.

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